

STATE OF CALIFORNIA
STATE WATER RIGHTS BOARD

ADOPTED APR 4 1963

In the Matter of Application 20732
of Western Municipal Water District
of Riverside County; Application
20800 of San Bernardino Valley
Municipal Water District; and
Application 20871 of San Gabriel
Valley Municipal Water District,
APPLICANTS.

Decision D 1121

Sources: Feather River,
Italian Slough
in Sacramento-
San Joaquin
Delta and
San Luis Creek

Counties: Butte,
Contra Costa,
and Merced

DECISION REJECTING AND CANCELING
APPLICATIONS FOR LACK OF JURISDICTION

Each of the three above-numbered applications states on its face that it is for a permit to appropriate unappropriated water of the Feather River and Italian Slough. Application 20800 also includes water of San Luis Creek. The water is to be conveyed to Southern California in state-owned and operated facilities and there delivered to the applicants pursuant to contracts with the State. The water will then be stored underground by the applicants and later recovered for beneficial use. Applications 20732 and 20871 state that by filing the applications the respective applicants reserve the right to occupy, use and appropriate the underground storage capacity described therein. Application 20800 states that in addition to seeking a permit to appropriate unappropriated water, the application is for a

permit to store underground all water to which applicant has title and also to manage the inflow and outflow of water in the underground reservoir.

Earlier applications to appropriate the same water are held by the State Department of Water Resources and have not yet been acted upon.

Because it was apparent that the applicants did not intend to divert water from the sources specified in the applications, but, on the contrary, expected to be supplied with the water through facilities owned and operated by the State, the Board and its staff questioned whether the applications proposed valid appropriations within the Board's jurisdiction to approve. Absent was an element generally considered essential to a valid appropriation, to wit, physical control of the water by the applicants at the points from which the water was to be appropriated. Consequently, a hearing was held at Riverside on October 25, 1962, for the limited purpose of considering the jurisdictional issue. The question whether unappropriated water is in fact available in the named sources to satisfy the applicants was reserved for a later hearing in the event it should be necessary to consider that matter. In the notice of hearing dated September 24, 1962, applicants were directed to respond to the following issues:

1. Which section(s) of Article 1, Chapter 1, Part 2, Division 2, of the Water Code cover the water to be appropriated by the applications?

2. What authority exists for the issuance of permits to the applicants for water which is also to be appropriated under earlier State filings and conveyed to Southern California through the State Water Resources Development System?

3. Will the applicants have sufficient possession and control of the water at the named points of diversion to constitute an actual appropriation of water under Applications 20732, 20800, and 20871?

4. Is the water to be appropriated unappropriated water within the meaning of Section 1375(d) of the Water Code?*

Applicants appeared at the hearing in support of their applications. The Department of Water Resources and others appeared in opposition to the validity of the applications and to the Board's jurisdiction to approve them.

*"1375. As prerequisite to the issuance of a permit to appropriate water the following facts must exist:

"***

"(d) There must be unappropriated water available to supply the applicant."

Position of Applicants
in Support of Jurisdiction

Western Municipal Water District

The position of Western as announced at the hearing is summarized as follows:

The storage capacity of the underground basins described in its application must be utilized in order to make full beneficial use of the water to be appropriated by the State under its applications and supplied to the District pursuant to contract. The storage capacity of these basins must ultimately be used by several agencies, a situation which may lead to serious conflict "unless the claims of the various agencies can be properly coordinated and the capacity equitably allocated" (RT 22). With this object in mind, Western reviewed the statutory powers of the State Water Rights Board to act as the appropriate administrative agency.

The Department of Water Resources will relinquish authority over the water appropriated pursuant to its filings once the water has been delivered to contractors and has passed the turnout structures from the State aqueduct. However, the State continues to retain a real interest in that water pursuant to Section 3, Article 14, of the Constitution and Sections 100, 101, and 105 of the Water Code, declaring the public interest in full development of all the water resources of the State. Responsibility over the public waters of the State is vested in the Board; therefore, the Legislature must have intended that the Board assert jurisdiction over underground storage.

Section 1253 of the Water Code empowers the Board to establish terms in connection with permits which will best develop, conserve, and utilize in the public interest the water sought to be appropriated. It would be proper for the Board to exercise this authority by appropriate conditions in permits issued both to the State and to contracting agencies in order to assure proper coordination and optimum beneficial use of the water to be appropriated.

Section 1242 of the Water Code* authorizes the Board to issue permits for storage of water in underground basins.

In response to the questions stated in the notice of hearing, Western asserts that the water to be stored is public water of the State, subject to appropriation under Section 1201 of the Water Code; its application is not intended as an original filing for water but "is a derivative claim under State Applications Nos. 14443, 14445A, and 15712" (RT 28); its application was filed as a member unit of a contractor with the State for water; Western does not seek to superimpose any new appropriation of water already made by the State--the State will have possession and control of the water at the points of diversions and until the water is delivered to the contracting agencies at which time they will assume possession and control; the water has already been

*"1242. The storing of water underground, including the diversion of streams and the flowing of water on lands necessary to the accomplishment of such storage, constitutes a beneficial use of water if the water so stored is thereafter applied to the beneficial purposes for which the appropriation for storage was made."

filed on by the State and is not unappropriated water within the meaning of Water Code Section 1375(d) (RT 30).

This applicant further explained that it was asking the Board to allocate to it storage capacity in the underground as against other applicants for rights to store water underground, but without prejudice to any existing property rights in the occupancy of that space (RT 60).

San Bernardino Valley Municipal Water District

The San Bernardino District explained its position as follows:

An application to the Board is the only mechanism that has been found to secure a determination by the State of the right of the District to store in underground basins and extract therefrom for beneficial use water that has been supplied to the District for such storage (RT 66, 95). The District claims this right, but it may be disputed (RT 65). The District is not seeking to appropriate unappropriated water. The water will be appropriated by the State (RT 67), and the District will receive title to it from the State (RT 95). The Board's authority to issue a permit to the District is not express but can be inferred from the constitutional provisions cited by Western. References in Application 20800 to unappropriated water were included merely for the purpose of complying with administrative requirements for an acceptable application and do not describe the applicant's real purpose (RT 69). Unlike Western, San Bernardino

is not asking for an allocation of storage space; its real purpose is to secure a determination that when it spreads water for underground storage it will not be abandoning the water (RT 96).

San Gabriel Valley Municipal Water District

The water will be appropriated by the State. Title will be transferred to the District upon delivery to the District's facilities. When the water is placed underground the District will lose possession and title, and the water will then become unappropriated, subject to the Board's jurisdiction (RT 106-109). Like the Western District, San Gabriel is not seeking to appropriate unappropriated water but is requesting a derivative permit (RT 109).

Discussion

The only applications for permits which the Board is expressly authorized to accept and approve are for the appropriation of unappropriated water. See Part 2, Division 2, of the Water Code, in particular Sections 1250 and 1252.*

By taking the position that these applications are not for permits to appropriate unappropriated water, but are for the right to store water in underground basins and/or to recapture

* "1250. The board shall consider and act upon all applications for permits to appropriate water and shall do all things required or proper relating to such applications."

"1252. Any person may apply for and secure from the board, in conformity with this part and in conformity with reasonable rules and regulations adopted from time to time by it, a permit for any unappropriated water."

water that has been stored underground, applicants must rely on an implied power of the Board. However, the only implied powers which an administrative agency may exercise are those which are necessary in order for it to carry out its express delegations of authority. Applicants have failed to demonstrate that the power to issue the kind of permits they desire is necessary to the exercise by the Board of its jurisdiction to issue permits for the appropriation of unappropriated water.

The constitutional and statutory provisions cited by applicants enunciate general policies which necessarily guide the Board in considering and acting upon applications for permits to appropriate water, but they do not themselves purport to establish or define the Board's jurisdiction. The Supreme Court declared in the Temescal decision* that Sections 1253 and 1255 of the Water Code give to the Board "a broad discretion in determining whether the issuance of a permit will best serve the public interest." But the Court also said that "Necessarily, the Department [Board] must make that determination [as to the availability of unappropriated water] as a prerequisite to any exercise of its discretion in the issuance of a permit." Section 1242 of the Water Code removes any doubt that water can be lawfully appropriated by diverting it to underground storage for later

*Temescal Water Co. v. Dept. of Public Works, 44 Cal.2d 90.

beneficial use, but we are unable to read into it authority to issue permits other than for the appropriation of water.

Water to be appropriated pursuant to permits to be issued to the State will not cease to be appropriated upon its delivery to the Districts for beneficial use by them. In fact, the State's appropriation will not be complete until such delivery and beneficial use have been fully accomplished, for both diversion and beneficial use are necessary ingredients of a valid appropriation--diversion alone will not suffice. If, as applicants contend, the water they will receive from the State will have to be stored in underground basins in order to make full beneficial use of it, there is no reason to suppose that the legal authority to do so will not be found, either under existing law or by enactment of new legislation.

The "derivative permit" theory advanced at the hearing has no support in statute or precedent. Eaton v. State Water Rights Board, 171 Cal. App. 2d 409, indicates that when permits have been issued to appropriate water of a stream, such water is not available for appropriation by another applicant.

Applicants are concerned with the failure of the State applications to specifically include underground storage as a means of appropriating the water to be supplied by the State to contracting agencies. This omission may be corrected by future amendment to the State applications. In any event it

cannot justify acceptance of applications by the agencies to supplement the State filings where no statutory authority for such supplementary applications has been provided.

It is clearly not the function of the Board to determine and declare existing rights of parties who appear before it, either as applicants or protestants. These are judicial functions which can be exercised only by the courts.

The theory advanced by counsel for the San Gabriel District that after water is placed in an underground basin it becomes unappropriated and subject to the Board's jurisdiction, even if correct, does not validate the District's applications because the application does not request a permit to appropriate water from the basin. Furthermore, the Board's jurisdiction of ground water is limited to "subterranean streams flowing through known and definite channels" (Water Code Sec. 1200).

The Board concludes that since none of the applications as interpreted by the applicants propose valid appropriations of unappropriated water within the jurisdiction of the Board, they should be rejected and canceled.

ORDER

IT IS HEREBY ORDERED that Applications 20732, 20800, and 20871 be, and the same are hereby, rejected and canceled for lack of jurisdiction.

Adopted as the decision and order of the State Water
Rights Board at a meeting duly called and held at
California, this day of , 1963.

Kent Silverthorne, Chairman

Ralph J. McGill, Member

W. A. Alexander, Member